

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD L. SHEPHERD,	§
	§
Defendant Below-	§ No. 189, 2008
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID Nos. 0608020349 and
Plaintiff Below-	§ 0605000753
Appellee.	§

Submitted: November 7, 2008

Decided: January 30, 2009

Before **HOLLAND, BERGER**, and **JACOBS**, Justices.

**ORDER**

This 30<sup>th</sup> day of January 2009, after careful consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The appellant, Donald Shepherd, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. We find no merit to the arguments Shepherd raises on appeal. Accordingly, we affirm the Superior Court's judgment.

(2) The record reflects that Shepherd was indicted in May 2006 on a charge of felony shoplifting. He failed to appear for his arraignment and was later picked up on a bench warrant. Following Shepherd's commitment in default of bond, correctional officers transported Shepherd to Christiana

Hospital for an examination. On the morning of August 20, 2006, Shepherd briefly escaped from a hospital bathroom but was captured shortly thereafter in a hallway of the emergency department. This incident led to Shepherd's indictment in October 2006 on a charge of second degree escape. On April 3, 2007, Shepherd pled guilty to both charges. In exchange for his guilty plea, the State dismissed charges pending against Shepherd under other indictments. On July 20, 2007, the Superior Court sentenced Shepherd as a habitual offender to a total period of four years at Level V incarceration, to be suspended after serving two years for decreasing levels of supervision. This Court affirmed the Superior Court's judgment on direct appeal.<sup>1</sup>

(3) The main gist of the arguments in Shepherd's opening brief challenge his conviction and sentence for second degree escape. Shepherd argues that he was under the influence of medication at the time of the alleged escape and did not know where he was or what he was doing. He contends that his trial counsel was ineffective for failing to file a motion to dismiss the indictment for second degree escape, which is a felony, because, according to Shepherd, the most he could have been charged with for attempting to leave the hospital was third degree escape, which is a misdemeanor. Shepherd suggests that his guilty plea was involuntary

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<sup>1</sup> *Shepherd v. State*, 2008 WL 1778224 (Del. Apr. 21, 2008).

because his counsel misinformed him. He also contends that trial counsel was ineffective and biased against him because he failed to supply Shepherd with discovery and failed to challenge the legality of his escape conviction on direct appeal. Finally, Shepherd contends that he has not received credit for all of the time he served in jail on his offenses prior to being sentenced.

(4) This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.<sup>2</sup> To prevail on a claim of ineffective assistance of counsel in the case of a guilty plea, a defendant must establish that (i) his trial counsel's representation fell below an objective standard of reasonableness; and (ii) but for counsel's unprofessional errors, the defendant would not have pled guilty but would have insisted on going to trial.<sup>3</sup> The defendant must set forth and substantiate concrete allegations of actual prejudice.<sup>4</sup> Moreover, there is a "strong presumption" that counsel's representation was professionally reasonable.<sup>5</sup>

(5) The fundamental flaw in Shepherd's arguments is his incorrect assumption that a charge of second degree escape requires proof that a

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<sup>2</sup> *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

<sup>3</sup> *Albury v. State*, 551 A.2d 53, 58-59 (Del. 1988) (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)). See also *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

<sup>4</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>5</sup> *Strickland v. Washington*, 466 U.S. at 689.

defendant escaped from a correctional facility. In fact, a defendant is guilty of second degree escape when the defendant “escapes from a detention facility *or* from the custody of ...the Department of Correction.”<sup>6</sup> Despite Shepherd’s contentions to the contrary, the correctional officer’s sworn affidavit stating that he took custody of Shepherd from the Delaware State Police and transported Shepherd to the Christiana Hospital where Shepherd ran out of a bathroom door and had to be chased through the hallways and tackled was a sufficient factual basis for Shepherd to be charged with second degree escape. There was no cause for Shepherd’s counsel to seek to dismiss the indictment against him. Accordingly, we reject Shepherd’s arguments that his trial counsel was ineffective for not seeking dismissal of the indictment and for not raising this argument on direct appeal.

(6) Furthermore, we find no merit to Shepherd’s suggestion that his guilty plea was involuntary due to his counsel’s ineffectiveness. In the first instance, we have already found there was no merit to the argument Shepherd now contends that his counsel should have raised prior to the entry of the plea. Moreover, the plea colloquy clearly reflects that Shepherd entered his plea knowingly, intelligently, and voluntarily. His voluntary

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<sup>6</sup> Del. C. Ann. tit. 11, § 1252 (2007).

guilty plea constitutes a waiver of any alleged defects arising prior to the entry of his plea.<sup>7</sup>

(7) Shepherd's remaining argument is that the Superior Court's sentencing order failed to credit him with all of the time he served in prison prior to the date of sentencing. Shepherd, however, failed to raise this argument in his direct appeal. He offers no cause for his failure to do so. Accordingly, we find that the Superior Court did not abuse its discretion in finding this argument to be procedurally barred by Superior Court Criminal Rule 61(i)(3).<sup>8</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>7</sup> *Benge v. State*, 945 A.2d 1099, 1101 (Del. 2008).

<sup>8</sup> Superior Court Criminal Rule 61(i)(3) provides that, any ground relief that was not asserted in the proceedings leading to the judgment of conviction is thereafter barred unless the defendant can establish cause for failing to raise the claim earlier and prejudice.